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DECLARATION OF PETITIONER OF GIL NATHAN MILEIKOWSKY, M.D. IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS AND EXPENSES UNDER THE PRIVATE ATTORNEY GENERAL STATUTE (CODE OF CIVIL PROCEDURE §1021.5)

GIL NATHAN MILEIKOWSKY, M.D. DECLARES:

1. I am the Petitioner in the above-entitled matter. I can testify to the facts and matters hereinafter set forth of my own, personal knowledge.

2. This Declaration is submitted in support of my motion for an award of attorneys' fees, costs, and expenses under the Private Attorney General Statute, Code of Civil Procedure §1021.5 because, I believe, all of the criteria necessary for such an award are present in this case. More specifically, I instituted and maintained a special proceeding against the Medical Board of California to fight against its attempt to revoke my medical license because of my refusal to comply with an unfounded November 12, 2002 order, purportedly issued under Business and Professions Code §820, that I submit to psychiatric and physical examinations, including drug testing and, if deemed warranted by the psychiatric examiner, psychological testing. This order, a true and correct copy of which is attached hereto marked exhibit "A" and is incorporated herein by this reference, was issued under circumstances that this court determined to be without good cause and without appropriate foundation.

3. This litigation resulted in the issuance by the court of its Judgment and Writ of Mandate, which enforced the rights of physicians to good cause and unbiased determinations in proceedings instituted under §820 by the Medical Board of California. These rights affect

the public interest by assuring that the public is not deprived of the choice of qualified physicians due to suspension or termination of medical licenses under circumstances such as present here, where physical and psychiatric examination was ordered based upon dubious, ill-founded determinations of a "consultant" selected in a manner that did not assure freedom from conflicts of interest or bias, who failed to consider all available relevant evidence. The court's Judgment and Writ of Mandate thus conferred a significant benefit upon the general public.

4. The court's Judgment and Writ of Mandate also conferred a significant benefit upon a large class of individuals, the approximately 100,000 California physicians licensed by the Medical Board of California, enforces their right to have orders that grossly violate privacy rights based upon good cause and freedom from bias and conflicts of interest in those who purport to evaluate physicians' qualifications to practice medicine was thereby vindicated.

5. An additional benefit to the public is the saving in tax dollars that will be accrued through the future avoidance of cases such as mine by requiring the Medical Board of California to pursue challenges to a physician's license only on the basis of well-qualified, unbiased determinations of good cause by qualified experts free of conflicts of interest, without connection with hospitals that have instituted proceedings against the physician to suspend, terminate or limit a physician's clinical/hospital privileges.

6. Because this action was taken against the Medical Board, a governmental agency, I, in my capacity as a private citizen, was the appropriate person to challenge the

agency's action, and thus am a proper person to recover attorneys' fees under §1021.5

7. I did not, however, take on this challenge only in the expectation that I would benefit, if successful, in procuring orders requiring the Medical Board of California to vacate and set aside its mental and physical examination order of November 12, 2002 and its July 16, 2004 decision revoking my license, but also, in the interest of the public and of my fellow physicians, to require that the Medical Board of California proceed only, in an appropriate, lawful fashion and then only upon a showing of good cause under Business and Professions Code §820. In the long run, sadly, I may not benefit at all if the Medical Board chooses to institute further proceedings, but conduct them in a manner consistent with this court's Judgment and Writ of Mandate, which must include full consideration of all relevant factors and available evidence, and the use of qualified, disinterested, medical reviewers. It was my desire to vindicate the rights of practitioners to be required to abide by only such Business and Professions Code §820 orders as are based upon an appropriate showing of good cause. It was my intention that, even if matters concerning my license might ultimately be resolved in a manner adverse to my interest, that all physicians would nonetheless benefit by this proceeding, as the Medical Board would be required, before issuing any further orders under §820, to consider all available evidence and relevant facts and then appoint as medical reviewers, only qualified, disinterested experts, free of bias and actual or potential conflicts of interest.[1]

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[1]The numbers of Petitions granted by the Medical Board of California, requiring physicians to submit to mental / psychiatric are not inconsiderable. During the 15 years 1990-2004, 131 such petitions were granted. A copy of the April 13, 2005 letter to me from the Medical Board of California's Discipline Coordination Unit

8. I believed that, in instituting this proceeding, a successful result would promote the public interest by assuring continued access to, and free choice of, qualified physicians while furthering the interest of appropriate peer review, properly conducted, and proper utilization by the Medical Board of its powers under Business and Professions Code §820 and §821, et seq.

9. An additional benefit that the Judgment and Writ of Mandate in this proceeding will provide to both the general public and physicians is the strong cautionary message that it sends to hospitals, their administrators and their medical staffs that efforts undertaken, without good cause and sound medical justification, to challenge the privileges of physicians on grounds that they are "psychologically impaired," or "distressed," or "disruptive" should be avoided. The Judgment and Writ of Mandate in this case will stand as a rebuke of the methods employed by the Medical Board in my case, of the underlying methods employed by Encino-Tarzana Regional Medical Center and its medical staff, and will caution hospital and medical staff institutions in general. I hope that the Judgment and Writ of Mandate will reduce use of the cynically developed use of psychiatric references as a means to effect "TAMING THE DISRUPTIVE PHYSICIAN," described in the article published by Hospital/Medical Staff Counsel Mark T. Kawa, Esq., which is part of the Administrative Record lodged in this proceeding on October 8, 2004, marked Exhibit "C", Vol 2, Ex 4, an additional copy of which is attached hereto, marked Exhibit "C" and is incorporated herein

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containing the year by year figures is attached hereto marked exhibit "B" and is incorporated herein by this reference.

by this reference. and is incorporated herein by this reference.

The abuses of the peer review and disciplinary processes advocated in Mr. Kawa's article have not gone unnoticed in the profession. For example, Lawrence R. Huntoon, M.D., Ph.D., whose declaration supports this motion, published an editorial several months ago in the Journal of American Physicians and Surgeons, addressing this very issue under the title, "Abuse of the 'Disruptive Physician' Clause". Dr. Huntoon comments on the adoption and insidious use of such bylaw provisions as a means to gain more control over physicians in hospitals. A true and correct copy of his article is attached hereto, marked Exhibit "D" and is incorporated herein by this reference. There have arisen, as adjuncts to the health care industry, entities that provide services in connection with "distressed" or "disruptive"physicians. References to some of these are found in the Vanderbilt Medical Center, Center for Professional Health website pages concerning "Assessment Programs." A true and correct copy of those materials is attached hereto, marked Exhibit "E" and is incorporated herein by this reference. [It is my information that physicians who are sent to such programs seldom escape their totalitarian grasp, much like the Soviet gulags of which Alexander Solzhenitzen has written.]

10. As Dr. Huntoon and others have commented, the persecution of physicians under the cynically adopted rubric of "disruptive physician" is often utilized by hospitals and medical staffs to remove privileges from, and thereby destroy the livelihood of physicians who report hospital improprieties to outside agencies. This was done in the case of a Reno, Nevada psychiatrist, Kenneth M. Clark, M.D., whose hospital staff privileges were restored

by the Supreme Court of Nevada in Clark v. Columbia HCA Information Services, Inc., et al (2001) 117 Nev.468, 25p.3rd 215. There can be little doubt that Encino-Tarzana Medical Center subjected me to the same treatment as was Dr. Clark.

On several occasions, from early 2000, and continuing thereafter, I pursued the best interests of the public and physicians attempting to improve the quality of health care, particularly at Encino-Tarzana Regional Medical Center. In this context I have made presentations critical of that hospital and its medical staff to the California Department of Health Services, the Institute for Medical Quality of the California Medical Association, the Joint Commission on Accreditation of Hospitals, and others. Two examples are attached hereto as Exhibits "F" and "G". These are also identified as Exhibits "C", Volume 1, Exhibits 10 and 11 in the Administrative Record of this proceeding. I wrote these letters on June 14, 2000 and July 29, 2000 to the California Medical Association Institute for Medical Quality, to address egregious failures to safeguard quality of care at Encino-Tarzana Regional Medical Center and the lack of appropriate peer and chart review at that hospital. The unwarranted summary suspension of November 16, 2000 and the December 5, 2000 §805 report by Tenet to the Medical Board of California followed shortly after these and my several other communications to outside agencies addressing the abysmal quality control of the delivery of medical care at the hospital and the lack of effective peer review.

Part of the effects of this proceeding and the Judgment and Writ of Mandate issued herein will be to inform hospitals and their medical staffs that quality of care and defective peer review cannot simply be swept under the rug by terminating the privileges of physicians

who reveal deficiencies in the quality of care and peer review at a hospital. I believe that the decision in this proceeding will prevent further "killings" of messengers.

Retaliation by hospitals and medical staffs, including transmitting reports that initiate Medical Board action against the licensee against whom such retaliation is brought, is exactly the kind of invidious conduct that is thoroughly discussed in the "Brief in Support of Petitioner by Association of American Physicians and Surgeons, Inc." heretofore submitted in this proceeding on August 10, 2004, and orders filed September 15, 2004. For convenience, an additional copy is attached hereto marked Exhibit "H" and is incorporated herein by this reference.

The unpleasant, relevant background of this case includes the conduct of Encino-Tarzana Regional Medical Center in retaliating against me for serving as an expert witness on behalf of medical malpractice plaintiffs in a case in which that facility and some of its medical staff members were defendants.[2] It is exactly this sort of retaliation that I hope the Court's Judgment and Writ of Mandate in this case will deter.

11. In connection with the above referenced matter, I was represented at various times herein by these attorneys: first, by Iungerich and Spackman, later by Roger Jon Diamond who, associated Paul M. Hittelman in the matter. I incurred attorneys' fees, costs and expenses, including projected attorneys' fees and costs for this motion, of $152,377.44, more particularly detailed as follows:

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[2]My declaration in opposition to the defendant's motion for summary judgment in that case(Head v. Vermesh, et al., Los Angeles Superior Court Case No. LC046932) is Exhibit "C", Volume 1, Exhibit 9 of the Administrative Record lodged herein on October 8, 2004. An additional copy, for convenience, is attached hereto, marked Exhibit "I" and is incorporated herein by this reference.

1) **Iungerich and Spackman:**

a)	Attorneys' Fees	$77,815.00
b)	Costs and Disbursements	$4,198.21
	Total:	**$82,013.21**

2) **Roger Jon Diamond:**

a)	Attorneys' Fees	$40,680.00
b)	Costs and Disbursements	$7.00
	Total:	**$40,687.00**

3) **Paul M. Hittelman:**

a)	Attorneys' Fees	$7,539.25
b)	Costs and Expenses	$11.00
	Total:	**$7550.25**

4) **Costs and Expenses paid directly by Petitioner:**

a)	Psychiatric examination and testing	$3,000.00
b)	Physical and neurological examination	$250.00
c)	Clinical laboratory tests	$122.00
d)	Transcripts	$621.65

e)	Courier Service (Filing)	$164.85
f)	Miscellaneous costs and expenses (postage, shipping, etc.)	$271.21
g)	Duplicating and photocopying	$1,659.33
h)	Travel expenses	$701.60
	Total	**$6,790.64**

SUMMARY OF COSTS INCURRED:

Iungerich and Spackman Total	$82,013.21
Roger Jon Diamond Total	$40,687.00
Paul M. Hittelman Total	$7,550.25
Expenses paid directly by Petitioner	$6,790.64
Total	**$137,041.10**
Projected Motion fees and costs	$15,336.30
Grand Total	**$152,377.40**

Copies of the billings submitted by the attorneys are attached to their respective declarations.

12. All of the sums incurred by me for attorneys' fees, costs and expenses were necessarily incurred in connection with presenting my petition in this matter. I had to borrow from my family in order to pay attorneys' fees and costs, for, as a result of actions taken against me in recent years by certain hospitals and by the Medical Board of California, the revenues from my practice have been reduced to a very small fraction of what they once were. I have incurred operating losses in the last several years of more than 1 million dollars

and, as a consequence, simply could not afford this action were it not for the financial help provided by family members.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20th day of June, 2005 in Los Angeles, California.

GIL NATHAN MILEIKOWSKY, M.D.

EXHIBIT "A"

BILL LOCKYER, Attorney General
of the State of California
PAUL C. AMENT, State Bar No. 60427
Deputy Attorney General
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2555
Facsimile: (213) 897-9395

Attorneys for Petitioner

**BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition to Compel Mental and Physical Examination Against:

GIL NATHAN MILEIKOWSKY, M.D.
2934 ½ Beverly Glen Circle, #373
Los Angeles, CA 90077

Physician and Surgeon's Certificate No. A040674

Respondent.

Case No. 17-2000-116392

ORDER COMPELLING MENTAL AND PHYSICAL EXAMINATION

[Bus. & Prof. Code, §820]

The Executive Director of the Medical Board of California having petitioned the Division of Medical Quality for an order to compel Gil Nathan Mileikowsky, M.D., (Respondent), Physician and Surgeon's Certificate No. A 040674, to undergo a mental and physical examination pursuant to Business and Professions Code section 820, and the Division having read and considered all the documents on file herein, and it appearing to the Division that Respondent Gil Nathan Mileikowsky, M.D., may be unable to practice medicine safely because his ability to practice is impaired due to mental illness, and/or physical illness affecting competency,

IT IS HEREBY ORDERED, pursuant to Business and Professions Code section 820, that:

EXHIBIT 'A'

1. Respondent Gil Nathan Mileikowsky, M.D., shall submit to a psychiatric examination and a physical examination by one or more physicians and surgeons and/or psychologists designated by the Division or its designee, in order to determine whether the ability of Respondent Gil Nathan Mileikowsky, M.D., to practice medicine safely is impaired because he is mentally ill, or physically ill affecting competency;

2. The examination(s) shall include drug testing, and shall include psychological testing if deemed warranted by the psychiatric examiner;

3. The examination(s) shall be conducted at a time convenient to Respondent Gil Nathan Mileikowsky, M.D., and to the examiner(s), but not later than thirty (30) days from the date of service of this Order;

4. The examiner(s) shall provide a detailed written report or reports of the findings and conclusions of the examination(s) conducted pursuant to this Order, which report(s) may be received as direct evidence in any administrative proceedings that may be filed as a result of the examination(s); and that

5. The failure of Respondent Gil Nathan Mileikowsky, M.D. to comply with this Order shall constitute grounds for disciplinary action suspending or revoking his physician and surgeon's certificate pursuant to Business and Professions Code sections 821, 2220, and 2234.

IT IS SO ORDERED THIS 12 DAY OF November, 2002.

RONALD WENDER, M.D., Chair - Panel B

DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA

EXHIBIT “B”

STATE OF CALIFORNIA – STATE AND CONSUMER SERVICES AGENCY ARNOLD SCHWARZENEGGER, Governor

MEDICAL BOARD OF CALIFORNIA
DISCIPLINE COORDINATION UNIT
1426 Howe Avenue, Suite 54
Sacramento, CA 95825-3236
(916) 263-2527 FAX (916) 263-2435
www.caldocinfo.ca.gov

April 13, 2005

Gil N. Mileikowsky, M.D.
FAX 310-858-1303

RE: Request for Statistical Information

Dear Dr. Mileikowsky:

We received your faxed letter requesting statistical data on April 7, 2005. In your letter, you requested "the number of physicians required to undergo psychiatric screening by the MBC since its inception." As we discussed on the telephone, the Board only has statistics from fiscal year (FY) 1990/1991.

The following information provides the number of Petitions to Compel a Mental/Psychiatric Examination that were granted by the Medical Board of California.

FY 1990/1991 - 4 Petitions were granted
FY 1991/1992 - 5 Petitions were granted
FY 1992/1993 - 7 Petitions were granted
FY 1993/1994 - 8 Petitions were granted
FY 1994/1995 - 13 Petitions were granted
FY 1995/1996 - 12 Petitions were granted
FY 1996/1997 - 5 Petitions were granted
FY 1997/1998 - 15 Petitions were granted
FY 1998/1999 - 18 Petitions were granted
FY 1999/2000 - 6 Petitions were granted
FY 2000/2001 - 8 Petitions were granted
FY 2001/2002 - 10 Petitions were granted
FY 2002/2003 - 12 Petitions were granted
FY 2003/2004 - 8 Petitions were granted

I hope this adequately replies to your request. Should you have any further questions, please feel free to contact me at (916) 263-2527.

Sincerely,

Kimberly Kirchmeyer, Manager
Discipline Coordination Unit

EXHIBIT 'B'

State of California
Department of Consumer Affairs
Medical Board of California

CENTRAL COMPLAINT UNIT
AND
DISCIPLINE COORDINATION UNIT

1426 HOWE AVENUE, SUITE 54
SACRAMENTO, CA 95825-3236
TOLL-FREE: (800)633-2322
FAX NUMBER: (916)263-2435

FAX TRANSMITTAL SHEET

TITLE PAGE PLUS 1 *PAGE(S)*

DELIVER AS SOON AS POSSIBLE TO:

NAME: Dr. Mileikowsky *FAX NO.:* 310-858-1303

THIS FAX IS BEING SENT FROM:

NAME: Kimberly Kirchmeyer *DATE:* 4-13-05

PHONE NO.: 916-263-2527

INSTRUCTIONS/SUBJECT:

Dr. Mileikowsky please see attached information pursuant to your request

Kimberly

PRIVACY NOTICE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, or exempt from disclosure under applicable federal or state law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via U.S. Postal Service. Thank you.

EXHIBIT "C"

I Call the following document: "The Confession of a Serial Killer".

Mark KAWA, Esq. has dedicated the last four years of his life to the destruction of my life. He has destroyed probably numerous physicians' careers in the last 15 years.

In Oregon, they found out that 1/3 of physicians who lose their license to practice Medicine commit Suicide!

KAWA is a principal Attorney for TENET

P.P.

EXHIBIT 'C'

Taming the Disruptive Physician

By Mark T. Kawa

Anyone who has worked in a hospital for any length of time probably knows one — and wishes he didnn't. I'm talking about the disruptive physician. You know the type, he (and with increasing frequency, she) throws temper tantrums, yells at colleagues, threatens lawsuits if his conduct or medical practice is reviewed, complains to patients about the nursing staff and generally adheres to the belief that the hospital's and Medical Staff's rules apply to everyone but him.

The disruptive physician's impact on patient care and hospital operations can be severe. Nurses and support staff may be so intimidated by the disruptive physician's conduct that they hesitate contacting him about patient issues for fear of incurring his wrath. Medical Staff members may find him so abusive that they choose to move their practice elsewhere. Hospital administrators may find themselves constantly addressing employee complaints and threats of hostile work environment litigation.

So how do you break the cycle and tame the seemingly untamable? Here's a few tips.

Identify Conduct That Is Unacceptable

All applicants to the Medical Staff should be notified at the time they apply for privileges (and when they are appointed and reappointed) that disruptive behavior will not be tolerated. The admonition should clearly describe what conduct is unacceptable and the consequences for acting inappropriately. The standards should be set forth in both the Medical Staff Bylaws and in a written Policy and Procedure.

cian to sign a "behavior contract" which sets forth the Medical Staff's expectations and identifies the types of discipline the physician will face if further violations persist. Following the meeting, the Department Chair or Chief of Staff should send the physician a letter summarizing the meeting and reiterating that disruptive conduct will not be tolerated.

Taking Disciplinary Action - Be Creative

At some point, the warnings must end and consequences imposed. In some instances, this may be done through administrative – as opposed to medical staff – sanctions. For example, if the physician's primary abuse is yelling at Medical Staff Office employees, the facility's Administrator can ban the physician from the Medical Staff Office. Likewise, if the physician physically threatens others, the Administrator can assign a security officer to follow the physician throughout the facility. Because these remedies are administrative in nature and do not impose a limitation on the practitioner's privileges, they are non-reportable and do not require a fair hearing prior to implementing.

This is exactly what Mr. Lurowitz - CEO of ETRMC - did on 6/23/00 immediately after I became a designated Expert on 6/19/00 in the Medical Malpractice case of Mrs and Mr. HEAD v. Vermesh, MD, TARZANA et al.

care will be easy to find. A physician who routinely yells at nurses every time they call him at home impacts patient care if the nurses become too intimidated to make further calls. Likewise, a physician who is constantly late to the operating room impacts patient care especially if his patients are under general anesthesia during the delay.

→ *Use an expert witnesses*. There are experts (generally psychiatrists) who are knowledgeable and well qualified to opine on the psyche of the disruptive physician. Hearing panel members who may not fully appreciate the disruptive impact of a physician may benefit from the testimony of an expert.

Focus on the Medical Staff's prior counseling

Send The Message That Disruptive Conduct Will Not Be Tolerated

Sometimes the physician's anger or frustration is justified, but his reaction is not. For example, a physician may have a legitimate cause for anger if a nurse gives the wrong medication. Yet rather than calmly addressing the situation through a private one-on-one conversation, or raising the matter with the nurse's supervisor, the physician screams at the nurse, writes an inappropriate note in the medical records or makes comments to the patient about the nurse's purported incompetence.

Situations such as these must be addressed with the physician firmly and immediately. Ignoring abusive conduct until it becomes intolerable sends the wrong message. It tells others that that disruptive physicians are welcome at your institution. It also makes it difficult when you finally do take disciplinary action. The physician will point to other physicians who have not been disciplined and argue that he is being unfairly singled out.

Use Progressive Discipline

A first time offender should be counseled face to face by his or her Department Chair. If the physician's conduct is directed at a hospital employee, the Chief Executive Officer and/or Human Resources representative should attend as well. The Chief of Staff should avoid involvement at this stage since it may be deemed an "investigation" under the Medical Staff bylaws and trigger reporting obligations to the Medical Board and Data Bank if the physician subsequently voluntarily resigns.

The tone of the meeting should be non-threatening, however the physician should be warned that further disruptive conduct could result in disciplinary action.

A subsequent infraction should be addressed in another face to face meeting led by the Department Chair and the Chief of Staff. The tone of the meeting should be harsher. At this point, it may be appropriate to require the physi-

Preparing For An Administrative Hearing

Sometimes the only viable remedy is to sanction the physician through the Medical Staff's peer review hearing process. If so, remember the following:

Document disruptive behavior immediately with incident reports or through other established reporting mechanisms. Prosecuting disruptive physician cases sometimes requires showing a pattern and practice of disruptive conduct spanning several years. Due to the passage of time, some witnesses may no longer work at the facility and cannot be located; other witnesses may have faulty memories. An incident report, prepared at the time of the incident, can provide admissible evidence of the physician's disruptive conduct.

Establish the link between disruptive conduct and patient care. Under California law, a physician's abusive conduct, by itself, is insufficient to justify disciplinary action. The conduct must impact patient care. Under the federal Health Care Quality Improvement Act ("HCQIA"), immunity exists only if the corrective action is taken in furtherance of quality health care.

Often the link between conduct and patient care will be easy to find. A physician who routinely yells at nurses every time they call him at home impacts patient care if the nurses become too intimidated to make further calls. Likewise, a physician who is constantly late to the operating room impacts patient care especially if his patients are under general anesthesia during the delay.

Use an expert witnesses. There are experts (generally psychiatrists) who are knowledgeable and well qualified to opine on the psyche of the disruptive physician. Hearing panel members who may not fully appreciate the disruptive impact of a physician may benefit from the testimony of an expert.

Focus on the Medical Staff's prior counseling efforts. Administrative hearing panels almost always consists of fellow physicians. By and large, they are a forgiving group when it comes to imposing discipline. Thus, if the peer review body believes the disruptive physician did not get sufficient warning or was otherwise treated unfairly, the disruptive physician will win, consequently emboldening him with respect to future behavior.. It is therefore imperative to emphasize the Medical Staff's efforts to modify the physician's conduct prior to initiating disciplinary action.

Mark T. Kawa is a Litigation and Healthcare Partner at Ervin, Cohen & Jessup LLP.

ERVIN, COHEN & JESSUP LLP

HEALTH CARE LAW

ECJ's Health Care Law Department has an extensive and diversified practice. Celebrating 50 years as a firm, ECJ has a long and rich tradition of providing a broad range of services to the health care industry.

ECJ believes in helping clients avoid problems before they arise, providing legal services that produce results quickly and economically, as well as building strong client relationships.

ECJ PHILOSOPHY

- *Transactions should be business driven not legally driven. Transaction models are meaningless without economic content.*
- *Risk should be quantified for the parties.*
- *Legal compliance should be governed by substance rather than form. Incentive structures that create a potential for abuse should be avoided.*
- *In a changing health care market, the parties should plan exits that preserve existing relations and goodwill.*

ECJ

John A. Meyers, Esq. ▼ Gary Q. Michel, Esq.
9401 Wilshire Boulevard ▼ Ninth Floor ▼ Beverly Hills ▼ California 90212-2974
Phone 310.273.6333 ▼ Fax 310.859.2325 ▼ www.ecjlaw.com

EXHIBIT "D"

Editorial:

Abuse of the "Disruptive Physician" Clause

Lawrence R. Huntoon, M.D., Ph.D.

Buried deep in the "Corrective Action" section of most medical staff bylaws is a provision known as the "Disruptive Physician" clause. It is arguably the most dangerous and, in recent years, the most abused provision in medical staff bylaws.

The term "disruptive physician" is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish.

How this treacherous trap got into medical staff bylaws is no mystery in most instances. It was added at the urging of hospital administrators, often with help from a medical staff president who was duped into believing that the clause would only be used in those extreme cases where a physician was found running drunk or naked through the halls of the hospital.

Lack of vigilance by physicians, and failure of medical staffs to obtain independent legal advice on changes to the bylaws, allowed most hospital administrations to insert this clause without difficulty or any meaningful opposition.

Why this clause was strategically placed in medical staff bylaws is also no mystery. It is part of the strategic plan developed in 1990 by the hospital industry. The stated goal was to gain more control over physicians in hospitals. Abuse of the disruptive-physician clause and increasing use of sham peer review has allowed hospital administrations to make great strides in achieving that goal.

Attorneys who specialize in representing hospitals have definite recommendations on how "disruptive physician" can be defined by a hospital, in order to remove a targeted physician from staff. In fact, some law firms offer seminars for hospital officials and their legal representatives that teach optimal methods for eliminating certain physicians that the hospital dislikes. Here are a few of the criteria for identifying a "disruptive physician":

1. **Political:** Expressing political views that are disagreeable to the hospital administration.
2. **Economic:** Refusing to join a physician-hospital venture, or to participate in an HMO offered to hospital employees, or offering a service that competes with the hospital.
3. **Concern for quality care:** Speaking out about deficiencies in quality of care or patient safety in the hospital, or simply bringing such concerns to the attention of the hospital administration.
4. **Personality:** Engaging in independent thought or resisting a hospital administration's "authority."
5. **Competence:** Striving for a high level of competence, or considering oneself to be right most of the time in clinical judgment.
6. **Timing:** Making rounds at times different than those of the "herd."

Although the disruptive-physician clause and sham peer review are current weapons of choice used by hospital administrations across the country, more weapons of physician destruction loom on the horizon.

Physicians should be aware of the "Code of Conduct" and "Exclusion from the Hospital Premises" clauses currently being promoted by the hospital bar.

AAPS has posted a letter dated January 31, 2003, to the General Counsel of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which was drafted by the leaders of the credentialing and peer review practice group of the American Health Lawyers Association, in the Hall of Shame on our website (see www.aapsonline.org). The letter is rated "R" for stark Reality. Physicians need to wake up quickly and take notice because this is what hospitals really have in mind for medical staffs across the nation. Interested readers can also learn more about the hospital industry's strategic plan, developed in 1990: see "Hospital Industry Reveals Its Strategic Plan: Control Over Physicians" in the AAPS Hall of Shame.

Physician vigilance, and advice from knowledgeable, independent counsel, are key to preventing further abuse of medical staff bylaws by hospital administrations.

Lawrence R. Huntoon, M.D., Ph.D., is a practicing neurologist and editor-in-chief of the *Journal of American Physicians and Surgeons.*

Memo to the Disruptive Physician

Oh how we strive
For quality high,
For health
And most of all safety.

But a word to the wise:
Reproof we despise
And outspoken physicians:
We hate thee.

Feel free to opine,
But note we define
All critics
As never constructive.

And, thus shall ensue
A sham peer review
And henceforth
You're labeled "disruptive."

EXHIBIT "E"

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Maintaining Proper Boundaries Outline

Program for Distressed Physicians Outline

Program for Distressed Physicians Overview

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Physician Wellness Committee and Physician Wellness Services

Faculty & Staff

Dying for a Drink

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Links to Other Resources

Center for Professional Health

Distressed Physicians Assessment Resources

ASSESSMENT PROGRAMS

(For Disruptive Physicians)

1) Pine Grove Professional Enhancement Program (PEP)
2255 Broadway Dr.
Hattiesburg, MS 39402
800 301-6693
Alexis Polles, MD or Mark Ely

2) Vanderbilt Comprehensive Assessment Program for Professionals
AA-2232 Medical Center North
Nashville, TN 37232-2647
615 322-4567
A.J. Reid Finlayson, MD or Ron Neufeld
http://www.mc.vanderbilt.edu/root/vumc.php?site=vcap&doc=564

3) Sierra Tucson
Assessment and Diagnostic Program (ADP)
39580 S. Lago del Oro Parkway
Tucson, AZ 85739
800 842-4487
Christi Cessna or Keith Arnold
http://www.sierratucson.com/

4) Professional Renewal Center (PRC)
1201 Wakarusa, Suite E-200
Lawrence, KS 66049
877 978-4772
Kirsten Irons or Scott Stacey
http://www.prckansas.org/

5) Talbott Recovery Campus (TRC)
Talbott Pathways Program
5448 Yorktown Dr.
Atlanta, GA 30349
800 445-4232
Lauren Smith or Nanci Stockwell

6) Multidisciplinary Assessment Program (MAP)
Rush Behavioral Health
Chicago, IL
312 942-4000
Carl Malin

7) Comprehensive Assessment Program
Professionals At Risk Treatment Services
Elmhurst Memorial Healthcare
183 N. York Rd.

EXHIBIT E

Elmhurst, IL 60126
630 758-5110
Glenn Siegel, MD

8) Colorado Personalized Education for Physicians
14001 East Iliff Avenue, Suite 206
Aurora, CO 80014
303 750-7150

Reasons To Refer

1. Increased pattern of complaints about the professional, from peers, staff or patients/clients re:
   - ❑ Disruptive behavior – verbal or physical attacks, profanity, threats, inappropriate demands, etc.
   - ❑ Reported sexual boundary problems – sexual harassment, inappropriate verbal comments or touching, etc.
   - ❑ Difficulty performing job duties
2. Sudden, unexplained change in behavior of unknown cause(s).
3. Unclear diagnosis
4. Repeated pattern of difficulty in managing anger.
5. Concern about increased anxiety, depression, burnout or other mood disturbance.
6. Cognitive impairment.
7. Use the assessment as a tool for intervention when referral for treatment is needed
8. When there is pending disciplinary action, licensing or credentialing issues.
9. For return to work, or limited practice recommendations.

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For questions concerning this Web site contact: cph@vanderbilt.edu.

EXHIBIT "F"

Gil N. Mileikowsky, M.D.

Infertility • Gynecology • Laser Surgery
In-Vitro Fertilization • Reproductive Endocrinology

6/14/00
Sent by Fedex
Airbill #
6582548442

Beverly. PARKS.
INSTITUTE for Medical Quality
CMA
221, Main Str. - 2nd floor
San FRANCISCO - CA - 94105

Re: ENCINO - TARZANA Regional Medical Center
Survey by the Institute for Medical Quality

Dear Ms. PARKS,

Thank You very much for spending Your time With me during Our phone Conversation on 6/12/00.

Please find enclosed the letter of Ms. HANSON of 7/27/99 and other pertinent material as Well as Copy of my letter to Ms. HANSON dated 6/14/00.

I shall be in Phoenix this Coming friday

West Valley Medical Center
5363 Balboa Boulevard, Suite 245 • Encino, CA 91316 • 818/981-1888 • 213/858-1888

EXHIBIT F

Gil N. Mileikowsky, M.D.

Infertility • Gynecology • Laser Surgery
In-Vitro Fertilization • Reproductive Endocrinology

6/16/00 Where I am to attend the delivery of Quadruplets of a patient of mine.

I shall be available to you Monday 6/19/00 and thereafter.

Please do not hesitate to call me at (310) 858 1300.

Respectfully Yours.

[signature]

Mailing address.
2934 1/2, Beverly Glen Circle #373
LA - CA - 90077.

West Valley Medical Center
5363 Balboa Boulevard, Suite 245 • Encino, CA 91316 • 818/981-1888 • 213/858-1888

Gil N. Mileikowsky, M.D.
Infertility • Gynecology • Laser Surgery
In-Vitro Fertilization • Reproductive Endocrinology

6/15/00

- 3 -

Note. After I spoke with you on 6/12/00 I received a phone call from attorney Jennifer, Nutter seeking my opinion regarding a law suit she filed on behalf of Mrs Donna, HEAD operated at TARZANA Hospital on 11/12/97. Both of her Tubes were removed without a Consent form for removal of ANY tube. The same surgeons removed mistakenly the wrong tube in another patient - Mrs. Barbara, KLEIN as the Ectopic pregnancy progressed in the other tube they re-operated the patient and removed her other tube. To the best of my knowledge neither one of these 2 cases were EVER reviewed by the ob/gyn Peer and chart Review Committee nor was it EVER discussed at the ob/gyn departmental meeting. I also mentioned to you today 6/15/00 the Absence of reporting of the Mix-up of Sperms at the IVF Program about 1½ to 2 years ago.

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TO WHOM IT MAY CONCERN:

We have heard the following:

In December of 1997, two separate female infertility patients were scheduled to undergo surgery at Encino Tarzana Regional Medical Center (Tarzana location) to have their eggs, which had been prepared for "harvest" in their infertility treatment, extracted. Following removal, the eggs were to be fertilized in the fertility laboratory at the hospital. One of those patients was a patient of Dr. Michael Vermesh, the medical director of the fertility program at the hospital and the other a patient of Dr. Paul Greenberg, another physician carrying out fertility procedures at the same hospital laboratory. Nurse Anna Richardson was charged at the hospital with the coordination of time schedules for the surgery of the fertility patients. Standard procedure at the hospital when multiple patients are scheduled for fertility treatments on the same day, is to separate the cases by one hour. This allows the short staffed and overworked fertility laboratory crew time to finish the treatment of one set of eggs prior to dealing with the eggs of the case to follow. For some unknown reason, on this date, both of the above patients had their surgeries scheduled by Nurse Richardson at the same hour.

The fertility laboratory technician scheduled to work that day was Cheryl Lamb. Cheryl was new to the Tarzana program. She had received no orientation from the infertility program medical director prior to beginning her duties.

With the surgery scheduling mix-up, instead of having two technicians present to deal with the two simultaneous cases, a decision was made to have Cheryl handle both cases. Both patients scheduled for surgery were made aware of the fact that there had been a scheduling "conflict", but were assured that this would not prove to be a problem.

Cheryl prepared for the two cases in standard fashion. Cheryl scratched the name of one patient on to the bottom of a small, plastic petri dish that would be used to hold and store that patient's eggs as they were collected at surgery. Onto a second dish, she scratched the name of the second patient.

Cheryl went to the operating room to accompany Dr. Ben-Ozer, Dr. Vermesh's associate as the first egg extraction was performed on Dr. Vermesh's patient. The case was seemingly uneventful, and 9 eggs were recovered. With a rush to prepare for the second case and the arrival of the second physician, Cheryl rapidly again went to the operating room, this time for Dr. Greenberg's patient. Once again, all appeared fine, with seven eggs being obtained by Dr. Koopersmith, Dr.

Such was the information provided to the two couples involved whom to this day remain unaware of what actually transpired. At the time of notification of the patients of the "deviation from protocol", the hospital adopted a stance of seeming "benevolence", granting each couple "three free additional IVF attempts". One of the couples was quite suspicious about what had happened and, on a "free" repeat IVF attempt, the husband would not allow his sperm or his wife's eggs out of his sight. It is said that one of the couples became pregnant on one of the "free" cycles, and the other did not.

As the story ends, Cheryl the technician was given the option of resigning or being fired. She resigned while considering a harassment suit over Dr. Vermesh's threats to her about ever "spilling the beans", and is now working elsewhere in Los Angeles, still shaken by this matter. Nurse Anna Richardson continues at the program, but constantly voices her unhapiness with Dr. Vermesh. Dr Hill, the interim laboratory director at the time resigned in disgust over the matter. He continues to serve as the Director at another large Tenet fertility program. He remains a highly respected scientist in his field, who adamantly refuses any additional association with Dr. Vermesh. The second laboratory technician at ETRMC who was off at the time of the incident also resigned in protest of Dr. Vermesh's actions, and transferred to Dr. Hill's program. Dr. Koopersmith has left the program but continues to practice locally. Dr. Greenberg continues with the program but has continued to express dissatisfaction with Dr. Vermesh's direction of the program. Drs. Vermesh and Ben-Ozer continue with their practice, and to this day, have never revealed the truth about what transpired. As medical director of the program, Dr. Vermesh should have brought the entire matter before the many quality assurance committees that we know exist in the hospital. To date, over one year later, this has not occurred. Dr. Vermesh is, however, currently under medical staff investigation for an unrelated infertility patient management irregularity. Hospital rules to protect patients clearly matter no more to Dr. Vermesh than California state law which also appears to have been violated. We obtained a document indicating that State law mandates that patients be advised of and "provide their *informed consent*" for *any* handling of their embryos, and clearly prior to the destruction of such embryos by their physician. This incident may qualify as a test of that law.

CONTACTS:

Cheryl Lamb (818) 248-3565
Paul Greenberg (818) 996-5550
Anna Richardson RN (818) 708-5389
David Hill (310) 201-6619
Dalu Surowitz (818) 881-0800

PATIENTS:

Greenberg's partner. Following their wives surgeries, the husbands of each patient produced a semen specimen in a properly labeled container. These specimens were to be used to inseminate their respective wives eggs. Each of the wives made an uneventful post operative recovery and went home a few hours after surgery.

As is the routine, three days after the surgery, each couple was scheduled to return to the hospital fertility laboratory to receive their now fertilized and growing embryos. Dr. Ben-Ozer was scheduled for the first embryo transfer. Dr. Vermesh's patient, being managed by Dr. Ben-Ozer was on the way to the laboratory to be prepared to receive her embryos. As Dr. Ben-Ozer reviewed the fertility laboratory paperwork associated with her patient, she noted a startling inconsistency. The paperwork on her patient indicated that "7 eggs" had been inseminated with her patient's husband's sperm. Dr. Ben-Ozer clearly recalled obtaining nine eggs at the time of surgery. Panic struck behind the doors of the fertility laboratory. Cheryl, present now to assist with the return of the embyos to the two patients was quickly questioned by Dr. Ben-Ozer about the discrepancy. Cheryl's face grew long in disbelief. She rapidly checked the laboratory data sheet on the second patient on whom Dr. Koopersmith had recovered seven eggs. The nature of the medical disaster was confirmed with the notation that "9 eggs" supposedly from Dr. Koopersmith's patient, but in reality from Dr. Vermesh's patient had been inseminated with the sperm from Dr. Koopersmith's patient's husband. And vice versa. Live, human embryos from each of the two women had been produced with "crossed" husband's sperm specimens. As noted, Cheryl was a new technician at the program, and had never been provided an orientation to her job by the medical director. She was never advised by the medical director of a policy requiring the technician to verify patient identities by checking patient wrist bands prior to each surgery.

With the patients, having now arrived at the hospital, anxiously awaiting word on the progress of their embryos, Dr. Ben-Ozer placed an urgent call to Dr. Vermesh. An emergency meeting was convened with the CEO of the hospital, Dale Surowitz, Tenet's risk management coordinators, Tenet attorneys, Drs. Vermesh and Ben-Ozer and the laboratory director, Dr. Hill, to discuss the handling of this grave matter. Dr. Greenberg was out of town. At the meeting, the decision was made by Dr. Vermesh, with the full concordance of Mr. Surowitz and the Tenet attorneys, and with the strong support of Dr. Ben-Ozer *not* to advise either of the patients involved of the true nature of the error related to the mixing of their eggs and sperm. The decision at the meeting was to immediately, and without notification of the patients, destroy the embryos resulting from the crossed sperm-egg specimens and to simply indicate to the patients that the handling of the embryos was "not consistent with laboratory protocols". They were simply to be advised that as a result of the "protocol deviation", no embryo transfer would be possible for either couple.

EXHIBIT "G"

Gil N. Mileikowsky, M.D.

Infertility · Gynecology · Laser Surgery
In-Vitro Fertilization · Reproductive Endocrinology

Ms. B. Parks
Institute for Medical Quality
California Medical Association
221, Main Str. - 2nd floor
San Francisco - CA - 94105

Saturday 7/29/00
Sent by Fedex
Tracking #8214-3731-6240

Re: Your Report about Medical Staff Compliance at Encino-Tarzana Regional Med. Ctr. for JCAHO Survey.

Dear Ms. Parks,

Since our last Conversation several important developments occurred. As a consequence of these, I feel as if I am living a "Horror Movie".

On or about 6/11/00, Ms Nutter, attorney representing Ms D. Head in a Malpractice case filed in 1998, called me to seek my Expert opinion. Enclosed, please find copy of my declaration filed 6/28/00.

436 N. Bedford Drive. Suite 300 · Beverly Hills, CA 90210 · 213/858-1888 · 818/981-1888

EXHIBIT G

The most shocking information is NOT in my declaration. No ONE in our department has ever heard of this gross breach of our most basic Standard of Practice (i.e. the sacrosanct relationship between a patient and Her/His physician) by an ob/gyn, Reproductive endocrinologist member of our Department.

Worst, the nursing staff failed twice in its role to safeguard the safety of this patient and Monitor the quality of Care delivered by the Surgeon.

Indeed, A nurse asked this patient

to sign a meaningless Consent form and Secondly, no incident report was filed by any operating Room nurse since Ms. Roberta White states that she NEVER heard of it (Ms. White was at the time in charge of the ob/gyn Dept. Peer and Chart Review Committee and was promoted to the Quality Assurance Dept at ETRMC).

There are Several levels of failures to Safeguard the quality of Care and Safety of the medical Care delivery System to our patients at ETRMC.

I Wonder if Some physicians escape Completely ANY form of Supervision and Can function With impunity. That's very dangerous and much more frightening because I happen to know a patient of mine Barbara KLEIN Who also filed a lawsuit against the Same two physicians because they remo-ved both of her tubes as Well! Only in Barbara's Case it Was performed in 2 operations about 10 days apart. Mrs. KLEIN had an Ectopic Pregnancy (like Mrs. Head), during the first procedu

these Same 2 physicians removed the Wrong tube (i.e. Not Containing the ectopic pregnancy), during the Second procedure they removed the only remaining tube with the ectopic pregnancy.

It's now over 2 years that I attempt to find out How Mrs. Klein's Case NEVER was reviewed either by the ob/gyn Peer - Chart review Committee or by the ob/gyn Dept to no avail. I raised that issue Once again on 6/10/00 when we reviewed, at the ob/gyn Dept. monthly meeting.

the new Criteria to select charts for Review and I Observed that a Similar Case Would escape Scrutiny again. Ms. R. White asked me for Mrs. B. Klein's name so that she could investigate it and, I gave her Mrs. D. Head's name as Well. I have NOT received ANY information from Mrs. White but she recently told me that I Would have to direct my questions to the Chairman of our Dept. Dr. B. FENMORE Who Was previously chairman of the ob/gyn Peer + Chart Review Committee and has close

professional ties with the physicians who committed both acts of negligence. In fact, there is a very significant amount of referrals between Dr. Fenmore and Dr. Vermesh.

What concerns me is how many other cases are there that "NO ONE" knows about in my department and other departments at ETRMC. That is the real question. My knowledge is limited and purely coincidental (I didn't know about Mrs. D. Head's case until 6/11/00 despite the fact that

She filed a lawsuit in 1998!)

That's why I believe that an in depth investigation is necessary to uncover the other "Skeletons in the Closet".

Only You, the JCAHO, the DHS... Have the power and authority to investigate and Monitor Compliance.

This is the Reason I bring this information to Your Outmost attention, for the sake of securing the Safety of Our patients and achieving the quality of medical Care that the public expects us to reach and that

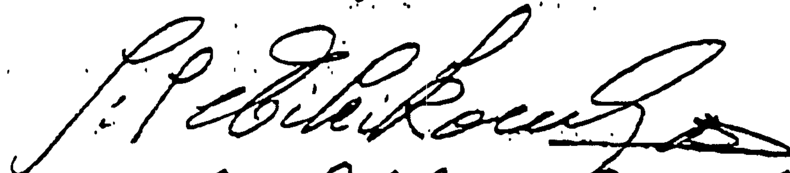
We Work so hard for.

I trust that you Will review diligently the enclosed documents and share With me your Comments and Observations.

Do not hesitate to Contact me anytime at (310) 858.1300, my FAX # is (310) 858 1303 and my personal address is:

2934 1/2, Beverly Glen Circle #373
LA - CA - 90077

Sincerely Yours,



- member California Medical Assoc.

c.c. 1) Catherine I. Hanson
Vice President and General Counsel - CMA.
2) Ms. Mary, MOONEY, RN.
JCAHO - Office Quality Monitoring
3) Mindel, SPIEGEL, MD, MPH
HFD Consultant - LA County Dept. Health Services

Enclosure: 1. My declaration on behalf of Mr + Mrs HEAD filed in Court 6/28/00 With Exhibits.
2. My letter dated 7/23/00 to Dr. Wulfsberg, MD with all the documents attached.
3. Transcript of Hearing With Judge Yaffe 7/11/00
4. Letter of Mr. Pittman dated 7/7/00 and law suit filed on my behalf in response to the Outrageous letter of Mr. Surowitz - CEO of ETRMC dated 6/23/00.
5. Transcript of "Voir Dire" Conference Call of 7/19/00
6. Correspondence between myself and Mr. Lowell, BROWN - "Hearing officer"
7. Letter of Mr. Surowitz - CEO of ETRMC dated 6/23/00 Re: "Security Monitoring" Sent to me 6 months AFTER the alleged incident. attached is Correspondence between myself Dr. Dosik - chief of Staff ETRMC, my attorney Mr. Hittelman, Mr. KAWA - attorney of ETRMC, Mr. CLUTE - COO at ETRMC and Dr. Yamini, MD.

EXHIBIT "H"

PARKER MILLS & PATEL LLP
DAVID B. PARKER, ESQ. (SBN: 072132)
865 South Figueroa Street, Suite 3200
Los Angeles, CA 90017
Telephone: (213) 622-4441
Facsimile: (213) 622-1444

COPY

ENDORSED
AUG 10 2004
By C. Miller, Deputy

Attorney for Applicant and Proposed Amicus Curiae
ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

GIL NATHAN MILEIKOWSKY, M.D.,

vs.

MEDICAL BOARD OF CALIFORNIA,

Respondent.

Case No: 04CS00969

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.

(ASSIGNED TO Judge Raymond Cadei)

Department 25

EXHIBIT 'H'

1 TO THE HONORABLE COURT AND THE ABOVE ENTITLED ACTION:

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. For over 60 years, it has defended the practice of private and ethical medicine. AAPS is dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS is one of the largest physician organizations that is almost entirely funded by physician membership, including many in California. This enables it to speak directly on behalf of physicians and their patients. AAPS files amicus briefs in cases of high importance to the medical profession, like this one. *See Sinaiko v. Medical Board of California*, No. 99-CS-02275 (Cal. Super. Ct., Ronald Robie, J.); *see also Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court citing AAPS frequently); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997).

AAPS opposes unjust interference in the practice of medicine by medical boards particularly where, as here, there has been retaliation against the physician for complaining at a hospital. Hospitals are notorious in initiating peer reviews that are motivated by economic or other improper factors rather than genuine concern about patient care, and in particular retaliating against Dr. Mileikowsky here. AAPS brings this application and seeks leave to make the amicus curiae submission set forth below in order to emphasize the need to protect Dr. Mileikowsky and others like him from arbitrary and capricious action by the Medical Board, as prompted by the hospital.

AAPS hereby applies for leave as *amicus curiae* to present the following:

1. AAPS submits that the Medical Board of California ("Medical Board") has ordered a psychiatric examination of Dr. Gil Mileikowsky ("Dr. Mileikowsky") in an arbitrary and capricious manner. As reflected in the record in support of the Petition, Dr. Mileikowsky has done nothing to jeopardize the health of any patient that would justify a state-mandated order of a psychiatric evaluation. He has not been sued for malpractice in over 14 years. He is not aware of any patient complaints about his practice. The Medical Board is apparently acting without a single patient complaint about Dr. Mileikowsky.

2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

[illegible] & Patel LLP
[illegible] Figueroa Street
Suite 3200
[illegible]geles, CA 90017

1 2. It was Dr. Mileikowsky who spoke up and commendably reported the improper
2 destruction of the embryos of a couple and agreed to testify against the Tenet-owned hospital
3 Encino Tarzana Regional Medical Center in a malpractice proceeding. The Medical Board's Order
4 dated June 24, 2004 ignores these pivotal facts and cites no support for ordering a psychiatric
5 evaluation. The Decision of Ronald L. Moy, M.D., dated July 16, 2004, further fails to cite any
6 support for so draconian an Order.

7 3. The record further reflects that Dr. Mileikowsky complained to the Medical Board
8 as early as February 2002 about improprieties at his hospital. Many months passed, and yet neither
9 the Board nor the Attorney General took any disciplinary or remedial action against physicians at
10 that hospital. On November 4, 2002, Dr. Mileikowsky complained further to the Medical Board
11 that two physicians at that hospital removed a patient's fallopian tubes without consent and that
12 frozen embryos had been improperly destroyed. This was a serious allegation of battery, yet, once
13 again, neither the Medical Board nor the Attorney General took any action against those
14 responsible. Instead, it has taken this unjustified action against Dr. Mileikowsky.

15 4. Business and Professions Code § 820 only allows state-mandated psychiatric
16 examinations when a physician "may be unable to practice his or her profession safely because the
17 [physician's] ability to practice is impaired due to mental illness, or physical illness affecting
18 competency, [in which case] the licensing agency may order the [physician] to be examined by one
19 or more physicians and surgeons or psychologists designated by the agency." To take such
20 extreme action, the Medical Board must make a showing of a threat to safety due to mental
21 impairment. The Medical Board cannot willy-nilly order any physician to undergo a psychiatric
22 examination. Here, Tenet's 805 Reports do not document any basis for believing such a threat
23 exists, much less that Dr. Mileikowsky has abused drugs.

24 5. Here, Dr. Mileikowsky has practiced for several years while the Medical Board has
25 considered his matter. By the Medical Board's own actions, it does not genuinely feel there is a
26 threat to patient safety. Nor does it give any reason in its order explaining why it thinks there may
27 be a threat to safety posed by Dr. Mileikowsky. An expert urologist reviewed the relevant
28 procedure, a circumcision, and said it was performed properly. The hospital's medical expert was

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[illegible] Figueroa Street
Suite 3200
[illegible], CA 90017

1 someone who had never done one himself. In any court proceeding, such purported expert
2 testimony would not even be permitted.
3 6. In addition, the Medical Board does not remotely suggest any impairment by this
4 physician. That is because there is none. Dr. Mileikowsky acted courageously in alerting the
5 board to misconduct at the hospital and should not be subjected to a psychiatric examination
6 because of it.
7 7. AAPS is all too familiar with the use of state-mandated psychiatric examinations to
8 unfairly destroy good physicians. The state selects and pays the psychiatrist, who is not then likely
9 to bite the hand that feeds it. AAPS has painfully watched physicians agree to seemingly
10 innocuous psychiatric examinations paid by their adversaries, only to be shocked at how the
11 evaluation departs from the standard of care in finding impairments where none exist. These tragic
12 misuses of psychiatric examinations to retaliate against physicians have become a national
13 calamity for medicine.
14 8. Meanwhile, this type of retaliation by a Medical Board and the Attorney General
15 sets a dreadful precedent for other physicians knowledgeable about poor hospital care. Dr. Scott
16 Plantz published a study of about 400 physicians in a 1998 edition of the *Journal of Emergency*
17 *Medicine*. He found that almost 1 in 4 of roughly 400 physicians who responded to his survey had
18 been terminated or threatened with termination for reporting problems with patient care. Steve
19 Twedt of the *Pittsburgh Post-Gazette* has reported on that same problem in his series "The Cost of
20 Courage." His articles demonstrated the pervasiveness of this problem nationwide, describing in
21 detail the experiences of 25 physicians and a nurse, all of whom suffered retaliation after trying to
22 improve care at their respective institutions. The author has informed us that Dr. Mileikowsky's
23 hospital peer review, yet to be completed, is the longest-running one in the nation.
24 9. Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court
25 of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at
26 the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse*
27 *Servs.*, 2004 Va. LEXIS 83 (Va., June 10, 2004). Though difficult to glean from the reported
28 decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State

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Hospital charged him with violating another employee's right to confidentiality. Similar to the fatuous charges against Dr. Mileikowsky here, the administration of Dr. Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. *See* Bob Stuart, "Court Rules for Whistleblower," *News Virginian*, June 16, 2004.

10. The incessant retaliation against physicians who report negligence, as Dr. Mileikowsky did, has kept the numbers of deaths caused by hospitals astronomically high. Several years ago a widely publicized study by the Institute of Medicine revealed that hospitals negligently kill as many as 98,000 patients each year. How could that be with so many physicians watching? The answer is illustrated by this case of Dr. Mileikowsky, who complained about hospital negligence and finds himself subjected to a license revocation and state-mandated psychiatric examination. Predictably, the numbers of deaths caused by hospital negligence have not declined since the Institute of Medicine's report.

11. The *Christian Science Monitor* observed just last month that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake ... [which] was more ... than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS (16,516)." It then added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," *Christian Science Monitor*, July 8, 2004. The only way to reduce these errors is to stop retaliation against physicians like Dr. Mileikowsky who speak out against them.

12. In fact, a more recent study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies, "Fatal Medical Errors Said To Be More Widespread," *Wall. Street Journal*, July 27, 2004, at D5. This Health Grades study was based on data from "37 million Medicare patients in every state over three years." *Id.* But when physicians like Dr. Mileikowsky complain about poor care, they face discipline by the hospital and revocation of their privileges or even license. This retaliation must stop to allow improvement in safety at hospitals.

...Mills & Patel LLP ...n Figueroa Street Suite 3200 ...ngeles, CA 90017

1 13. The impact of allowing retaliation against physicians like Dr. Mileikowsky is
2 severe. While the hospital benefits economically from hushing up problems and covering up
3 negligence, the public pays an enormous price indeed. Lives are lost and destroyed. In this case,
4 embryos were senselessly destroyed and fallopian tubes wrongfully removed. Establishing quality
5 control of the delivery of medical care is economically harmful to the hospital, but essential to the
6 public's safety and economics. Dr. Mileikowsky's complaining should not force him to see a
7 psychiatrist, which seems plainly more aimed at destroying his credibility. Killing the messenger
8 does not resolve the problem. Instead, the hospital should be held accountable. Dr. Mileikowsky
9 also reported the failure to remove a fallopian tube containing an extra uterine (ectopic) pregnancy,
10 a life threatening condition. Yet, neither the Medical Board of California nor the Attorney General
11 took any corrective action against either hospital or physicians.

12 14. In 2003, Tenet Healthcare Corporation and Tenet HealthSystems Hospitals, Inc., the
13 owners and affiliates of the hospital at issue here, paid $51 million "to settle government
14 allegations that Tenet's Redding, California facility performed unnecessary cardiac procedures that
15 were then billed to Medicare, Medicaid and TRICARE. In addition, Tenet paid nearly $3 million to
16 reimburse California's Medicaid funds." "Corporate Accountability and Compliance in Health
17 Care - Will Health Care be the Next Enron?", *Mondaq Business Briefing*, July 26, 2004. These are
18 but two reports, among many, involving Tenet. This case should be viewed in that broader
19 context. Punishing Dr. Mileikowsky, who was reporting the misconduct at Tenet, only encourages
20 greater fraud and more losses to the public, to whom the Medical Board and the Attorney General
21 owe their protective mission.

22 15. AAPS does not contest the power of the Medical Board to order an examination
23 where it provides a legitimate basis for such order. But no such basis exists here. Quite the
24 opposite, Dr. Mileikowsky's skills as a surgeon have never been seriously questioned. Being a
25 whistleblower against a powerful hospital does not suggest the need for psychiatric examination
26 ordered by the State under threat of revocation. If anything, the uncontested fact that he made
27 multiple prior reports of wrongdoing should warrant a higher level of justification by the Medical
28 Board, and correspondingly higher level of scrutiny by this Court.

[illegible] Mills & Patel LLP
[illegible] Figueroa Street
Suite 3200
[illegible], CA 90017

16. The revocation of Dr. Mileikowsky's license would end his career, whether stayed or not by a psychiatric examination. Revocation is typically career-ending for any hospital-based physician such as an OB/GYN like Dr. Mileikowsky, because it announces to the whole world that the physician is so dangerous that he had to be removed from the profession. Federal law requires reporting it to the National Practitioners Data Bank, upon which all hospitals nationwide rely. Revocation is the rarest of disciplinary actions by a hospital, the professional version of the death penalty, and must therefore be confined to situations far more extreme than that presented at bar.

17. It is disastrous to medical economics and public safety for the Board to be able to revoke the license of Dr. Mileikowsky for speaking out in favor of patient care and against the destruction of embryos by the hospital. That outspokenness may well be unsettling to the for-profit, Tenet-owned hospital and maybe even unsettling to the Medical Board, but it does not justify revoking his license or forcing him to undergo a psychiatric evaluation in order to discredit and humiliate. Virtually no good physician would be still practicing if speaking out against hospital negligence or error justified revocation and psychiatric evaluation. *See, e.g.*, *McMillan v. Anchorage Comm. Hosp.*, 646 P.2d 857, 859 (Alaska 1982) (reversing a summary suspension of a physician based on "disruptive behavior" without a showing that the physician's "activities or conduct resulted in any immediate threat to a particular patient").

18. AAPS is concerned that while the Attorney General and Medical Board apparently took no action in response to Dr. Mileikowsky's very serious allegations of unconsented surgery and destruction of embryos, the Medical Board is instead acting to revoke Dr. Mileikowsky's license without any patient complaints or substantial evidence of wrongdoing. This is manifestly unjust.

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Mills & Patel LLP
Figueroa Street
Suite 3200
Los Angeles, CA 90017

1 19. Because the Medical Board decision is arbitrary and capricious, and unsupported by
2 substantial evidence, it should be stayed pending a full hearing by this court. It is in the public
3 interest to stay and reverse this revocation in order to prevent the retaliation that it represents.
4 DATED: August 9, 2004 Respectfully submitted,

5 PARKER MILLS & PATEL LLP
6 DAVID B. PARKER

7
8 By:
9 DAVID B. PARKER
Attorneys for Applicant and Proposed Amicus
10 Curiae ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS, INC.
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12 DBP:an
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R MILLS & PATEL LLP
...th Figueroa Street
Suite 3200
...geles, CA 90017

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3) ss.
COUNTY OF LOS ANGELES)

4 I am employed in the County of Los Angeles, State of California. I am over the age of
5 eighteen (18) years and not a party to the within action; my business address is: 865 S. Figueroa
6 Street, Suite 3200, Los Angeles, CA 90017.

7 On August 9, I served the following described as: **APPLICATION FOR LEAVE TO**
8 **FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.** on the interested parties in this action by
9 placing a true copy thereof enclosed in a sealed envelope addressed as follows:

10 **SEE ATTACHED SERVICE LIST**

11 [x] (MAIL) I am readily familiar with the firm's practice of collection and processing
12 correspondence by overnight mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the
13 ordinary course of business. I am aware that on motion of the party served, service is
14 presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

15 [ ] (BY TELECOPY) I caused such document to be delivered by telecopy transmission to
16 the offices of the addressee.

17 [ ] (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the
18 offices of the addressee.

19 [x] (STATE) I declare under penalty of perjury under the laws of the State of California
20 that the above is true and correct.

21 [ ] (FEDERAL) I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

22 Executed on August 9, 2004, at Los Angeles, California.

23

24 ALICIA NAVARRO
PRINT NAME

SIGNATURE

25
26
27
28

Mills & Patel LLP
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geles, CA 90017

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EXHIBIT “I”

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Attorneys for Plaintiffs,
DONNA HEAD and RICHARD HEAD

ORIGINAL FILED

JUN 2 8 2000

LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

DONNA HEAD and RICHARD HEAD,

Plaintiffs,

v.

MICHAEL VERMESH, M.D., individually and d.b.a. Center for Human Reproduction and d.b.a. The Center for Fertility and Gynecology; SNUNIT BEN-OZER, M.D.; AMI/HTI TARZANA ENCINO, a business entity, form unknown, d.b.a. Encino/Tarzana Regional Medical Center; WEST COAST CLINICAL LABORATORIES, L.P., a limited partnership; and DOES 1 through 50, Inclusive,

Defendants.

CASE NO. LC 046 932

DECLARATION OF GIL N. MILEIKOWSKY, M.D. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

DATE: July 12, 2000
TIME: 9:00 a.m.
DEPT: Z

Complaint Filed: December 30, 1998

Discovery Cutoff: July 7, 2000
Motion Cutoff: July 21, 2000
Trial Date: August 7, 2000

I, Gil N. Mileikowsky, M.D., declare as follows:

1. I have personal knowledge of the facts stated in this declaration, except as otherwise stated, and if called upon to do so I could and would competently testify thereto.

2. A summary of my qualifications to render an opinion in this matter is as follows: I am certified by the Board of Obstetrics & Gynecology in the United States and Belgium, and am licensed to practice medicine in California, Texas and Belgium. I obtained a medical degree, Cum Laude, from the Catholic University of Louvain, Belgium in 1979. I then completed four years of residency

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Attorneys for Plaintiffs,
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Filed in Court
6/28/00

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

DONNA HEAD and RICHARD HEAD, Plaintiffs, v. MICHAEL VERMESH, M.D., individually and d.b.a. Center for Human Reproduction and d.b.a. The Center for Fertility and Gynecology; SNUNIT BEN-OZER, M.D.; AMI/HTI TARZANA ENCINO, a business entity, form unknown, d.b.a. Encino/Tarzana Regional Medical Center; WEST COAST CLINICAL LABORATORIES, L.P., a limited partnership; and DOES 1 through 50, Inclusive, Defendants.	CASE NO. LC 046 932 **DECLARATION OF GIL N. MILEIKOWSKY, M.D. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION** DATE: July 12, 2000 TIME: 9:00 a.m. DEPT: Z Complaint Filed: December 30, 1998 Discovery Cutoff: July 7, 2000 Motion Cutoff: July 21, 2000 Trial Date: August 7, 2000

I, Gil N. Mileikowsky, M.D., declare as follows:

1. I have personal knowledge of the facts stated in this declaration, except as otherwise stated, and if called upon to do so I could and would competently testify thereto.

2. A summary of my qualifications to render an opinion in this matter is as follows: I am certified by the Board of Obstetrics & Gynecology in the United States and Belgium, and am licensed to practice medicine in California, Texas and Belgium. I obtained a medical degree, Cum Laude, from the Catholic University of Louvain, Belgium in 1979. I then completed four years of residency

at the Department of Obstetrics & Gynecology at Baylor College of Medicine and a two-year fellowship at LAC/USC Medical Center, Women's Hospital Clinical Research Fellow Reproductive Endocrinology and infertility, including in-vitro fertilization. I was a Clinical Instructor in Obstetrics and Gynecology at USC School of Medicine from 1984 through 1987. Thereafter, I was Chairman of the Laser and Safety Committee of Northridge Hospital from 1987 through 1988. I was Medical Director of the In-Vitro Fertilization Program at Northridge Hospital Medical Center from 1988 to 1994 and an Assistant Clinical Professor at UCLA from 1994 until 1998. I have just recently been accepted as a life member of the National Registry of Who's Who in medicine. I also continue to see private patients and have been on staff at Tarzana Regional Medical Center (formerly known as AMI) since 1986. A true and correct copy of my current curriculum vitae, which outlines my experience and expertise in further detail, is attached hereto as <u>Exhibit A</u>.

3. Based upon my education, training and experience, I am familiar with the standards of care applicable to medical practioners in the community who specialize in obstetrics, gynecology, and infertility and am qualified to render an opinion regarding the treatment of Donna Head at the hands of Drs. Michael Vermesh and Snunit Ben-Ozer.

4. I have reviewed the following in order to prepare this declaration:

a. medical records of Donna Head, including, but not limited to, the following:

i. the hospital consent form for Ms. Head's November 12, 1997 surgery;

ii. the "Informed Consent" form signed by Dr. Ben-Ozer prior to Ms. Head's November 12, 1997 surgery;

iii. the operative report of Ms. Head's November 12, 1997 surgery prepared by Dr. Ben-Ozer;

iv. the Consent Form for Procedures Involved in In Vitro Fertilization and Pre-Embryo Replacement from the Center for Reproductive Medicine signed by Donna Head and her husband;

v. the laboratory report from San Fernando Valley Institute for Reproductive Medicine regarding Ms. Head's embryo transfer procedure and the handling of her eggs;

///

vi. the complete records provided by Dr. Michael Vermesh relating to Donna Head;

vii. the complete records provided by Dr. Snunit Ben-Ozer relating to Donna Head;

viii. the complete records provided by Encino-Tarzana Medical Center relating to Donna Head;

ix. the complete records provided by Dr. Karrie McMurray relating to Donna Head;

b. deposition testimony of Dr. Michael Vermesh;

c. deposition testimony of Dr. Snunit Ben-Ozer;

d. deposition testimony of Dr. Alan Bricklin;

e. deposition testimony of Donna Head; and

f. the moving papers served by Drs. Vermesh and Ben-Ozer and the Center for Human Reproduction in support of their motion for summary adjudication.

5. Based upon my education, training, and experience, and upon my review of the foregoing materials, it is my opinion that the actions admittedly taken by Drs. Vermesh and Ben-Ozer in failing to obtain Donna Head's informed consent to remove her Fallopian tubes fell far bellow the standard of care. There is no support in the doctors' deposition testimony or records for their contention that they obtained Ms. Head's permission to perform this procedure at all, let alone met the applicable standard of care for obtaining the patient's informed consent.

6. It is the obligation of the surgeon and the hospital nursing staff to obtain a patient's informed consent for any surgical procedure. Additionally, the standard of care in the United States, including this community, for any surgery dictates that the surgeon must obtain a patient's *written* consent where it is possible to do so (i.e., if the patient is unconscious, consent should be obtained from the family).

7. In this case there was ample time to obtain Ms. Head's written consent. Dr. Ben-Ozer met with Ms. Head the morning of the surgery to discuss the possibility that Ms. Head had an ectopic pregnancy. (This meeting is reflected in Dr. Ben-Ozer's patient notes, Ben-Ozer Depo., Exh. G.)

Further, there was clearly time for a hospital consent form to be filled out, as evidenced by the wholly inadequate form signed by Ms. Head. However, Ms. Head's written consent for removal of her Fallopian tubes was not obtained. There are only two consent forms in Ms. Head's records provided by Drs. Vermesh and Ben-Ozer and by the hospital. (Copies of these forms are attached hereto as Exhibits B and C for ease of reference.) The consent form signed by Dr. Ben-Ozer (Exh. B) indicates that the patient has given consent for the "noted procedure(s)." However, no procedures are noted on the form. The hospital consent form (Exh. C) indicates that the procedure to be performed is "ectopic pregnancy, laparoscopy." The notation "ectopic pregnancy" is a diagnosis, not a procedure. It indicates that the patient is either suspected or known to have an ectopic pregnancy. The only procedure listed on Ms. Head's form is a laparoscopy. As Dr. Ben-Ozer admits, a laparoscopy is merely a viewing procedure and does not involve the removal or dissection of any body parts. (Ben-Ozer Depo., 37:11-16.) To say that these two written forms are grossly insufficient if they are being championed as consent for a bilateral salpingectomy (removal of both Fallopian tubes) is an understatement.

8. Additionally, California law requires that physicians obtain their patients' written consent prior to performing elective, i.e. non-emergency, sterilization procedures. The patient must sign a Health and Welfare Agency ("HWA") consent form. (A true and correct copy of this form is attached hereto as Exhibit D.) The consent form must be used before doctors perform even less drastic procedures than the tubal removal performed on Ms. Head, such as tubal ligations (tying the Fallopian tubes to prevent future pregnancies). There was no emergency requiring the removal of Ms. Head's Fallopian tubes and her consent on this form should have been obtained. However, even if Ms. Head's ectopic pregnancy could be deemed an emergency situation, the 1997 California Healthcare Association Consent Manual makes clear that if the emergency does not mandate a procedure that could result in sterilization, the HWA form must be used. Included in the definition of an elective sterilization is a "sterilization that is performed at the same time as emergency abdominal surgery or premature or early delivery, but is not a necessary incident to the emergency abdominal surgery or premature or early delivery." (CHA Consent Manual, 24th Edition, 1997, p. 3-10.)

9. Setting aside for a moment that the doctors' failure to obtain the patient's *written* consent in and of itself falls below the standard of medical care, the doctors' allegations that they obtained Ms. Head's *oral* consent are not supported by either the records or testimony in this case.

a. First, Ms. Head testified at her deposition that she never gave consent to the removal of either of her Fallopian tubes. The procedure explained to her was that the doctors would look with the laparoscope to determine if she had an ectopic pregnancy and, if so, that the pregnancy would have to be removed. (Head Depo., 40:16-41:14.) She was never told that the Fallopian tube the ectopic pregnancy was in would have to be removed and she was certainly never told by either doctor that the uninvolved Fallopian tube would be examined at all, let alone removed. (Head Depo., 41:15-22.)

b. Second, Dr. Vermesh admitted he had no memory of obtaining Ms. Head's consent to remove her Fallopian tubes. (Vermesh Depo., 16:23-17:4, 20:4-6, 20:19-23, and 31:3-5.)

c. Third, Dr. Ben-Ozer admitted twice during her deposition that she had no memory of obtaining Ms. Head's consent to remove her Fallopian tubes. When asked at her deposition if she obtained Ms. Head's consent, Dr. Ben-Ozer responded, "Yes, I did, if necessary." (Ben-Ozer Depo., 25:9-11.) She then expanded upon the purported consent discussion by saying that she discussed "that a *possible* treatment for the ectopic pregnancy *may* 'require' a salpingostomy or salpingectomy or *perhaps* a salpingo hysterectomy." (Ben-Ozer Depo., 25:12-26:9, internal quotes added.) After again contending that she obtained Ms. Head's consent for the bilateral tube removal, (yet providing no *details* of the consent supposedly given), Dr. Ben-Ozer made a very telling admission. She testified, not once but twice, that she had no memories of *any* consent discussions with Ms. Head. (Ben-Ozer Depo., 26:10-27:20.)

d. Finally, Ms. Head's medical records contain absolutely no evidence that the doctors obtained her consent to remove her Fallopian tubes. I have reviewed Dr. Ben-Ozer's November 12, 1997 patient notes which she asserts reflects her discussion about treatment for Ms. Head's possible ectopic pregnancy. I see nothing in these notes that reflects an oral consent from Ms. Head's for the removal of her Fallopian tubes. The only note that directly relates to Ms. Head's November 12, 1997 surgery states: "plan - repeat HCG => if ↑ing consider L/S, D&C." (This

1 meeting is reflected in Dr. Ben-Ozer's patient notes, Ben-Ozer Depo., Exh. G.) Dr. Ben-Ozer's notes
2 merely suggest that she may have had a discussion with Ms. Head regarding a possible laparoscopy
3 and D&C. Again, a laparoscopy is simply a viewing procedure. A D&C is a removal of the uterine
4 content. Thus, Dr. Ben-Ozer's notes also do not support her contention that she obtained Donna's
5 consent to remove her Fallopian tubes.

6 10. It is the usual practice in this community and, therefore, part of the requisite standard
7 of care, for doctors to put procedures in place to ensure that a patient is sufficiently informed about
8 the details, risks, and scope of any anticipated surgery. On a more basic level, doctors must, and in
9 this community generally do, have procedures and safeguards in place to ensure that they have the
10 patient's permission to perform the surgical procedure. Most doctors, myself included, have their own
11 office written consent forms that they discuss and complete with patients prior to surgery. This form
12 is the primary consent form, and is only supplemented by the hospital consent form which is
13 completed by the patient along with hospital staff just prior to the surgery.

14 11. My own practice of obtaining informed consent from my private patients in a case such
15 as Ms. Head's would be as follows:

16 a. I would discuss the details of any proposed surgical procedure, including the
17 reasons for the procedure, the nature and scope of the procedure, and any potential risks and
18 complications;

19 b. I would ask the patient to read and sign my office form entitled "Laparoscopy -
20 Informed Consent" (a true and correct copy of this form is attached hereto as Exhibit E);

21 c. I would ask the patient to read and sign my office form entitled "Laparotomy -
22 Informed Consent" (a true and correct copy of this form is attached hereto as Exhibit F);

23 d. I would fill out a general consent form to reflect the planned procedure as
24 "video-laparoscopy,[1] possible laparotomy,[2] possible salpingostomy[3] (unilateral vs. bilateral),[4] possible

25 ---

26 [1] A video-laparoscopy is a viewing procedure achieved by inserting a "telescope" into the patient's abdomen through the navel.

27 [2] A laparotomy is an incision made through the abdominal wall, thus exposing the abdominal
28 organs.

salpingectomy[5] (unilateral vs. bilateral), possible laser lysis of adhesions.[6]" I would then ask the patient to read and sign the form and would have all three forms witnessed by a nurse and sometimes a family member (a true and correct copy of this form is attached hereto as Exhibit G); and

e. I would prepare pre-operative admission orders and would attach all three consent forms as part of the patient's admission orders.

12. It is common knowledge in the medical community that doctors use their own office written consent forms. This is particularly so in the field of reproductive medicine where a woman's ability to reproduce in the future is vulnerable. As practicing fertility doctors in this community, Drs. Vermesh and Ben-Ozer are either conscious of these consent practices or have made a conscious effort to avoid ascertaining what standard consent practices are. Their failure to obtain an intra-office written consent before performing a bilateral tubal removal on Ms. Head constitutes a flagrant and conscious disregard of community practice established to protect the rights of patients to make fundamental decisions regarding their own fertility and their own bodies.

13. Another particularly surprising and alarming observation I have made in my review of this matter is the complete lack of pre-operative admitting orders for her November 12, 1997 surgery. Pre-operative admission orders provide another opportunity for the physician to verify that the appropriate informed consent has been obtained from the patient. Attached hereto as Exhibit H is a true and correct copy of Tarzana Regional Medical Center's Physician's Order Outpatient Surgery form for Ms. Head's surgery. The top half of the form is to be used for the physician's pre-operative admission orders. In Ms. Head's case, the entire top half of the form -- including the portion where the specifics of the patient's consent are to be filled in -- is completely *blank*! Sometimes physicians submit their own pre-operative orders on a separate form, but after a complete review of Ms. Head's

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[3] A salpingostomy is simply the opening of a Fallopian tube (in this case in order to remove the ectopic pregnancy).

[4] Unilateral v. bilateral means that the procedure might be performed on one or both sides.

[5] A salpingectomy is the surgical removal of a Fallopian tube.

[6] Adhesions are a union of bodily parts by a growth of tissue. A laser lysis of adhesions is a process by which the adhesions are disintegrated with the use of a laser.

hospital records, I cannot locate such a form. The hospital records are completely devoid of *any* physician pre-operative orders.

14. It is basic standard practice for physicians to complete admission orders for all patients they admit to a hospital for surgery. Further, Ms. Head's surgery was performed at Tarzana Regional Medical Center where I am also a staff physician, so I can attest that it is the practice of physicians operating at Tarzana to submit admitting orders. The failure of Drs. Vermesh and Ben-Ozer to complete any patient admission orders for Ms. Head's November 12, 1997 surgery also fell well below the community standard.

15. The standard of practice in this community additionally requires that a woman's written consent be obtained before her eggs or embryos are discarded. Consent is required regardless of the stage of development. Here, Drs. Vermesh and Ben-Ozer also failed to obtain Ms. Head's consent, written or otherwise, for the disposal of three fertilized eggs. Such failure also fell well below the applicable standard of care.

16. The only consent form in Ms. Head's medical records that addresses the handling of her eggs is the Center for Reproductive Medicine's "Consent Form for Procedures Involved in In Vitro Fertilization and Pre-Embryo Replacement." This form indicates that the patient's eggs (oocytes) may be used in one of only three listed ways:

- the eggs may be combined with sperm in the laboratory and immediately transferred into the patient;
- the eggs may be combined with sperm in the laboratory, examined for fertilization and, if embryonic development takes place, the "pre-embryos" may be then be transferred into the patient; or
- the eggs may be combined with sperm, fertilized, and then frozen for later use.

The form further indicates that embryos will be frozen and stored if the patient requests. The form specifically states: "We understand that if we request spermatozoa to be added to more oocytes than the number of pre-embryos we want replaced in this cycle of treatment, that any excess pre-embryos may be cryopreserved [frozen] for our future use."

17. Importantly, embryos can be frozen at any stage of development. Consequently, the

laboratory form used for Ms. Head's embryo transfer procedure has a line for the technician to indicate at what stage any embryos are frozen. (A copy of this form is attached hereto as Exhibit I for ease of reference.) There is no mention in the consent form that embryos will be monitored for a period of time to determine whether they reach the blastocyst stage and then be automatically discarded if they do not. Rather, the consent form simply states that unused embryos will be frozen if the patient wishes.

18. There is evidence in this case regarding the potential mishandling of Ms. Head's unused embryos that I find quite disturbing and possibly reminiscent of the Irvine situation -- there are at least three (3) embryos unaccounted for. The Post Embryo Transfer Instructions from Ms. Head's embryo transfer procedure indicate that 14 of the 19 eggs retrieved were fertilized. (Ben-Ozer Depo., Exh. I.) Ms. Head and her husband were told that seven (7) of these fertilized eggs reached a developmental stage appropriate for transfer to Ms. Head. (Head Depo., 97:3-22.) The Heads decided to use only four (4) of the seven (7) available embryos in order to minimize the risk of multiple births. (Head Depo., 97:3-22.) Ms. Head was told by Dr. Ben-Ozer that there were three (3) embryos remaining after the transfer procedure that had reached the blastocyst stage and that these embryos had been frozen and stored. (Head Depo., 51:23-53:11.) However, when Ms. Head went to see Dr. Vermesh several days after her tubes were removed (only one month after the embryo transfer), Dr. Vermesh could not account for the three (3) remaining embryos, barely one month after Ms. Head's embryo transfer procedure. (Head Depo., 51:15-22.)

19. A note on the laboratory report from Ms. Head's embryo transfer procedure appears to state: "embs discarded did not reach blast," suggesting that some embryos did not reach the blastocyst stage. However, there is no number of allegedly discarded embryos reflected on this form. More fundamentally, this notation contradicts what Ms. Head was told -- that she had three remaining embryos that had reached the blastocyst stage.

20. Even if it were the case, as Defendants contend, that none of the embryos actually did reach the blastocyst stage, there is no assertion in the doctors' declarations or deposition testimony that they obtained Ms. Head's oral permission to dispose of her remaining embryos. Indeed, both doctors testified that they have no memory of the egg retrieval or embryo transfer procedures, and are relying

only on the medical records to determine what occurred.

21. It is fundamental and basic that the disposal of fertilized eggs or embryos at any developmental stage must be consented to, in writing, by the patient. A doctor's failure to obtain a woman's consent to dispose of her embryos at any stage of development is clearly below the standard of care. The doctors' failure to obtain Ms. Head's permission, let alone informed consent, to dispose of her remaining embryos constituted an egregious breach of their duty to Ms. Head, falling well below the standard of care they owed her.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of June, 2000, at Los Angeles California.

Gil N. Mileikowsky, M.D.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is: 12400 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025.

On June 20, 2005, Appellant served the foregoing document(s) described as **PETITIONER'S NOTICE OF MOTION FOR ATTORNEYS' FEES, COSTS AND EXPENSES UNDER THE PRIVATE ATTORNEY GENERAL STATUTE (Code of Civil Procedure Section 1021.5); POINTS AND AUTHORITIES; DECLARATION OF GIL N. MILEIKOWSKY, M.D.** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Robert C. Miller, Deputy Attorney General
Attorney General's Office
1300 "I" Street, Suite 125
Sacramento, CA 94244-2550

David Parker, Esq.
Parker, Mills & Patel, LLP
865 So. Figueroa St. Suite 3200
Los Angeles, CA 90017
Fax: (213) 622-1444
(Association of American Physicians & Dentists - AAPS)

[X] (BY MAIL) In accordance with the regular mail collection and processing practices of this business office with which I am familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope for collection and mailing on this same date following ordinary business practices, and/or

STATE

[X] I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 20, 2005, at Los Angeles, California.

Mary L. Conry